TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 309.

THE BOARD OF COUNTY COMMISSIONERS OF YELLOWSTONE COUNTY, MONTANA TERRITORY, APPELLANT,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF CUSTER COUNTY, MONTANA TERRITORY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED MARCH 28, 1887.

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1 In the District Court of the First Judicial District of the Territory of Montana in and for the County of Gallatin.

TERRITORY OF MONTANA *ex rel.* BOARD OF COMMISSIONERS OF CUSTER COUNTY
vs.
BOARD OF COMMISSIONERS OF YELLOWSTONE COUNTY.

Be it remembered that among the proceedings, records, and pleadings had, made, and filed and entered in the above-entitled cause, in said district court, were the following, to wit:

On the 17th day of April, 1884, the plaintiff filed in the office of the clerk of the district court in and for the county of Custer the application and affidavit of William H. Bullard on application for a writ of mandate, which is in the following words and figures, to wit:

TERRITORY OF MONTANA, } ss:
County of Custer, }

William H. Bullard, being duly sworn, on oath deposes
2 and says: I am a citizen and tax-payer of the county of Custer and Territory aforesaid, and am above the age of twenty-one years. Deponent further says that he is one of the county commissioners of the said county, duly elected and qualified and acting as such, and that as such county commissioner he makes this affidavit for and on behalf of the board of commissioners of the said county of Custer, in pursuance of a resolution passed by the said board and adopted by them at an extra session thereof, begun and holden at the county seat of said county, on the 8th day of October, A. D. 1883.

Deponent further says that a large part of the territory and area embraced within the present county of Yellowstone, in said Territory of Montana, was previous to the organization of the said county of Yellowstone a part of the county of Custer, in said Territory of Montana; that the said county of Yellowstone was created and organized under the provisions of an act of the Legislative Assembly of the Territory of Montana entitled An act to create the county of Yellowstone and for the election of officers thereof; which
3 said act was approved on the 26th day of February, A. D. 1883; that by the provisions of said act the said county of Yellowstone was attached to the said county of Custer for judicial purposes, and the officers of said Custer county were to act as officers of the said Yellowstone county, except as otherwise provided by said act, till the first day of May, A. D. 1883.

Deponent further says that while the said county of Yellowstone remained so united and attached to the county of Custer for judicial purposes as aforesaid there was, on the 10th day of April, A. D. 1883, at Miles City, the county seat of said county of Custer, begun and holden a term of the district court of the third judicial district

of the said Territory of Montana in and for the said county of Custer and the county of Yellowstone, which said term of court was duly appointed to be held at the time and place last aforesaid; that at the term of court so held as aforesaid at the said county of Custer there were brought and were pending and then and there tried and otherwise disposed of by the said court at said time a large
4 number of causes from the said county of Yellowstone, on account of which was incurred a large part of the public expense of said term of court, which said part of said expenses was incurred for and on account of and is chargeable to the said county of Yellowstone while the same was so attached to Custer county; and deponent further says that at the close of said term of court so held as aforesaid the Honorable Decius S. Wade, chief justice of said Territory, who was the presiding judge of said term of court, did make an inquiry as to what share of the public expense of said term of court so held as aforesaid was incurred for and on account of said county of Yellowstone and properly chargeable thereto; that upon said inquiry the said judge did find that the expenses of said term in the following-named cases were incurred for and on account of the said county of Yellowstone—that is to say:

The Territory of Montana *vs.* Jeremiah Cokely.
The Territory of Montana *vs.* James Edwards.
The Territory of Montana *vs.* Henry Lump.
The Territory of Montana *vs.* George A. Arthur.
The Territory of Montana *vs.* Daniel Leahey.
5 The Territory of Montana *vs.* James Mekever.
The Territory of Montana *vs.* John Sullivan.
The Territory of Montana *vs.* Gorden D. Tapper.
The Territory of Montana *vs.* Henry Luke.
The Territory of Montana *vs.* H. C. Boker.

And deponent further says that the said court and the judge thereof did thereupon at the said term of court aforesaid rule that the said board of county commissioners of the county of Yellowstone reimburse the said county of Custer all costs, charges, and public expenses incurred at said term of court aforesaid in all of the cases herein named, and the said court and the judge thereof did further order that the said board of commissioners of the said county of Yellowstone draw their warrant on the treasurer of their said county against the general fund thereof, payable to the county commissioners of the county of Custer, for said expenses and forward the same to the county treasurer of the said Custer county; and did further order that the clerk of said court should, as soon as practicable, furnish the board of commissioners of each of the said counties of Yellowstone and Custer a statement of the items of the said
6 expenses incurred in the said causes, all of which will more fully appear by reference to the said order of the said judge, a full and true copy of which said order, taken from the records of said court, is hereto attached and marked Exhibit "A," and for the purposes of this application is made a part of this affidavit.

Deponent further says that the clerk of said court did thereupon, in pursuance of such order, furnish to each of the said counties

aforesaid a statement of the several items of expense chargeable to the said county of Yellowstone, as was by the said order required that he should.

A true copy of which said statement of items of expense so furnished by said clerk is hereto annexed and marked Exhibit "B," and for the purposes of this application is made a part of this affidavit; and deponent says that in fact, and as by said bill of items of expense appears, there were incurred at the said term of court aforesaid by the said county of Custer for and on account of the said county of Yellowstone, in and about the said causes before named, expenses amounting to the sum of $5,812.20; that
7 said sum became and thereupon was due and payable to the said county of Custer in warrants drawn upon the treasurer of the said county of Yellowstone against the general fund thereof and payable to the county commissioners of the said county of Custer; but deponent further says that, though the said bill of items of costs and expenses so incurred by the said county of Custer as aforesaid was long since furnished by the clerk of the said court, both to the county commissioners of the county of Yellowstone and also to the board of commissioners of the county of Custer, and although requested, the said board of commissioners of the county of Yellowstone, wholly disregarding the said order of the said judge and in disobedience of the said order, have refused and still do refuse to draw a warrant for the said sum so due the said county of Custer as aforesaid, or for any part thereof.

And, finally, deponent says that, there being no plain, speedy, and adequate remedy in the ordinary course of law and the premises, he, in pursuance of a resolution of the board of commissioners of the county of Custer adopted October 8, 1883, makes
8 this affidavit and asks that a writ of mandamus may be issued out of the said court first above mentioned on the behalf and relation of the board of commissioners of said county of Custer, directed to the county commissioners of the said county of Yellowstone, commanding them that they, the board of commissioners of the said Yellowstone county, do cause a warrant to be drawn on the county treasurer of their said county against the general fund of said county for the said sum of five thousand eight hundred twelve and $\frac{20}{100}$ dollars ($5,812.20), payable to the county commissioners of the said county of Custer, as by the said order required, and in satisfaction and payment of the expenses incurred by the said county of Custer, as hereinbefore set forth.

W. H. BULLARD,
County Commissioner.

Subscribed and sworn to before me this 5th day of March, A. D. 1884.

[SEAL.]

THEO. MUFFLEY,
Clerk 1st Judicial District,
By CHARLES DOUGLAS,
Deputy Clerk.

9 EXHIBIT "A."

April Term, April 27, 1883. In the District Court of the Third Judicial District of the Territory of Montana in and for the County of Custer.

At a regular term of said court, begun and holden at the court-house, in Miles City, in said county, on the 10th day of April, A. D. 1883.

Present: Honorable D. S. Wade, chief justice of said Territory, at the term of the said court.

It appearing to the court that a portion of the expenses of said term has been incurred on account of the county of Yellowstone, which is attached to said county of Custer, for judicial purposes, and the court having made inquiry as to what half of the public expenses of such term was incurred for and on account of the said county of Yellowstone, so attached to said county of Custer—

It is ordered by the court that the board of county commissioners of the said county of Yellowstone do reimburse to the said county of Custer all costs, charges, and public expenses in-

10 curred at said term in the cases following—that is to say:

The Territory of Montana *vs.* Jeremiah Cakely, James Edwards, John Sullivan, Daniel Leahey, H. C. Baker, George A. McArthur, Henry Lump, James McKeever, Henry Luke, Gorden D. Tapper.

And it is further ordered that the said board of commissioners of the said county of Yellowstone draw their warrant on the treasurer of their county against the general fund thereof, payable to the county commissioners of said county of Custer, for said expenses *for said expenses*, and forward the same to the county treasurer thereof; and it is further ordered that the clerk of the court do, as soon as practicable, furnish to the said board of commissioners of each of said counties a statement of the items of said expenses.

(Signed) D. S. WADE, *Judge.*

Attest: ALEX. H. BEATTIE, *Clerk,*
By W. E. SAVAGE,
Deputy Clerk.

11 TERRITORY OF MONTANA, }
County of Custer, } *ss:*

I, Theo. Muffly, clerk of the district court of the first judicial district in and for said county, do hereby certify that the above is a true and correct copy of the original order of the court, as found on page 34 of the records of court proceedings of the said county of Custer.

Witness my hand and official seal this 10th day of October, A. D. 1883.

THEO. MUFFLY, *Clerk,*
[SEAL.] By CHAS. DOUGLAS,
Deputy Clerk.

EXHIBIT "B."

The county of Yellowstone to Custer county, Dr.

Itemized account of expenses incurred by Custer county for Yellowstone county (annexed for judicial purposes to Custer county) during the April term, 1883, of the third judicial district of Montana Territory.

Sheriff's Fees.

TERRITORY OF MONTANA
vs.
12 JEREMIAH CAKELY.

April 21.	Serving bench warrant, 1.00; ret., 50; mi., 40	1 90
April 21.	Transportation, 50; taking into court, 50	1 00
"	Committing & discharging	1 00
"	Serv. 3 subp's, 1.50; copies, 1.50; mi., 1.20; ret., 50	4 70
23.	Committing & discharging	1 00
25.	Serv. 1 subp., 50; copy, 50; mil., 1.40; return, 50	2 90
	Com'it'g & disch. during trial	2 00
26.	" " " "	1 00
	Discharge	50

TERRITORY OF MONTANA
vs.
HENRY LUMP.

April 18.	Serv. 4 subp's, 2.00; copies, 2.00; mileage to Ft. Keough, 1.00	5 00
	Ret., 50; serv. sub., 50; copy, 50; mil., 1.40; ret., 50	2 40
	Serv. 1 subp., 50; copy, 50; mil., 40; ret., 50	1 90
	Commit'g & discharging	2 00
	Serv. 6 subp's, 3.00; copies, 3.00; mil., 40; return, 50	6 90
13 April 18.	Serv. 3 sub., 1.00; copies, 1.00; mil., 40; ret., 50	2 80
April 21.	Committing & discharging	1 00
22.	Discharging	50

TERRITORY OF MONTANA
vs.
JOHN SULLIVAN.

April 14.	Serv. bench warrant, 1.00; ret., 50; mil., 40	1 90
	Transp., 1.00; taking into court, 1.00	2 00
	Committing & discharging	2 00
17.	Serv. 1 subp., 50; copies, 1.50; mil. to Forsyth, 20.00; ret., 50	22 50

TERRITORY OF MONTANA
vs.
JOHN SULLIVAN.

April 17.	Serv. 4 subp., 2.00; copies, 2.00; mil., 40; ret., 50	4 90
20.	" 1 " 50; " 50; milage to Forsyth, 20.00; ret., 50	21 00
	Serv. 1 subp., 50; copies, 50; mil., 40; ret., 50	1 90
	" 1 " 50; " 50; " 44.00; ret., 50	45 50
26.	Comit'g & disch. during trial	1 00
	Discharging	50

TERR'Y OF MONTANA
vs.
JAMES EDWARDS & JAMES MCKEEVER.

April 14.	Serv. bench warrant, 2.00; ret., 50; mil., 40	2 90
	Transp., 1.00; taking into court, 1.00	2 00
14	Commit. & discharging	2 00
20.	Serv. 4 subp., 2.00; copies, 2.00; mil., 1.60; ret., 50	6 10
21.	" 3 " 1.50; " 1.50; mi. Forsyth, 20.00; ret., 50	23 50
	Serv. 2 subp., 1.00; copies, 1.00; mi., 40; ret., 50	2 00
24.	Commit. & disch'g during trial	4 00
26.	" " "	2 00
	Discharging	1 00

TERRITORY OF MONTANA
vs.
DANIEL LEAHEY.

April 11.	Serv. 6 subp., 3.00; copies, 4.50; mil. to Bozeman, 132.00; ret., 50	140 00
	Serv. 3 sub., 1.50; copies, 3.00; milage to junction, 44.00; ret., 50	49 00
13.	Extra milage to Yellowstone park	32 00
16.	Serv. 1 subp., 50; copy, 50; mil., 40; ret., 50	1 90
	Commit'g & discharging	1 00
18.	" " during trial	1 00
19.	" " "	3 00
	Serv. 1 subp., 50; copy, 50; mil., 40; ret., 50	1 90
		$352 50
	Amount	418 50

15

TERRITORY OF MONTANA
vs.
DANIEL LEAHEY.

Ap'l 19.	Serv. 6 subp., 3.00; cop., 3.00; mil., 40; ret., 50	6 90
20.	1 ret'd subp., unserved	50
	Discharged by suicide	50

TERRITORY OF MONTANA
vs.
GEORGE A. MCARTHURS.

April 14.	Serv. bench warrant, 1.00; ret., 50; mil., 40; transp., 50; to court, 50	2	90
	Committing & discharging	1	00
16.	Serv. 5 subp., 2.50; cop., 2.50; mil'g. to Livingston, 120.00; ret., 50	125	50
17.	Serv. 2 sub., 1.00; cop., 1.00; mil., 80; ret., 50	3	30
	" 1 " 50; " 50; " 13.00; " 50	14	50
18.	Ret'd 1 subp., unserved		50
19.	Serv. 1 sub., 50; cop., 50; mil. to Livingston, 120.00; ret., 50	121	50
20.	Serv. 2 subp., 1.00; cop., 1.00; mil., 40; ret., 50	2	90
	" 3 " 1.50; " 1.50; " 1.20; " 50	4	70
	Com'it. & disch. during trial	3	00
28.	Discharging		50

TERRITORY OF MONTANA
vs.
H. C. BAKER.

Ap'l 14.	Serv. bench warrant, 1.00; ret., 50; mil., 40; trans., 50	2	40
	Taking into court		50
16	Committing & discharging	1	00
20.	Discharge		50

TERRITORY OF MONT.
vs.
GORDEN D. TAPPER.

April 18.	Discharge		50
		$293	10
	Total am't of sheriff's fees	711	60

The County of Yellowstone to Custer County, Dr.

Affid's of attendance & mileage of witnesses.

Days in att'e.	Names.	Miles.	Doll's.
4	A. L. Buell	300	12 00
5	Geo. E. Buechenridge	300	75 00
6	Samuel Hanson	300	78 00
3	A. H. MacKinzie	620	133 00
6	Dr. Parker	300	78 00
4	Caleb Rich	420	96 00
4	J. L. Holmes	600	132 00

Days in att'e.	Names.	Miles.	Doll's.
6	Sam. Shilde	300	78 00
6	Alonzo Gates	600	138 00
4	Charles Wood	300	72 00
11	Charles Wood		33 00
8	Mrs. J. D. Russell	300	84 00
2	Sam. Hen	600	126 00
17	167 John W. Ward (held in sheriff's charge)		324 00
6	Geo. B. Selverberg	300	78 00
8	D. Deffenbach		24 00
11	M. B. Radmaker	300	93 00
5	J. H. Gerrish	300	75 00
5	Mathew Matherson	300	75 00
6	W. K. Campbell	300	78 00
6	W. Sweatland	300	78 00
9	M. T. Taberg	600	147 00
7	Chas. Pfieffer	300	81 00
1	James Gardner	300	63 00
1	Thomas Wheeler	300	63 00
7	Sam'l Davis	300	81 00
7	Wm. Baker	300	81 00
2	T. A. Davie	300	66 00
8	William Jones	600	144 00
9	George Neil	600	147 00
			$2,833 00
18	Forward		$2,833 00
1	A. L. Buell	280	59 00
1	A. L. Buell	320	67 00
10	John Winnett	600	150 00
4	W. Costello	300	72 00
10	Thomas Wheeler	300	90 00
8	John Johnson	300	84 00
12	Joe E. Crank	1,048	245 60
5	John Clarke	300	75 00
12	C. P. Blake		36 00
12	T. J. Laughlin	300	96 00
12	W. P. Wyman	300	96 00
12	Ed. Creeley	600	153 00
10	Ben. Foster	300	90 00
2	James B. Cooper		6 00
5	Frank P. Reese		15 00
9	Wm. Bigney	300	87 00
12	Swan Berg	80	52 00
12	Charles Johnson	80	52 00
6	Thos. McAlpin	100	38 00
4	Anton Appel	300	102 00

Days in att'e.	Names.	Miles.	Doll's.
4	H. T. Smyth	176	47 00
9	R. Richmond	300	87 00
19 12	Gus Logain	80	52 60
2	Joseph Reed	220	50 00
4	Joseph Crow	300	72 00
3	Wm. Bode	320	73 00
1	Josie Gains	400	83 00
5	Maud Stevens	220	59 00
5	John Smith	321	79 00
			$2,267 60
			5,100 60
	Sheriff's bill		711 60
	Total amount		$5,812 20

I, W. E. Savage, deputy clerk of third judicial district of Custer county & Territory of Montana, do certify this to be a correct account of all expenses incurred by Custer county for Yellowstone county (annexed for judicial purposes to Custer county) during the April term, 1883.

[SEAL OF COURT.]

ALEX. H. BEATTIE, *Clerk*,
By W. E. SAVAGE,
Deputy Clerk.

TERRITORY OF MONTANA, } ss:
County of Custer, }

20 I, James H. Garlock, county clerk of Custer county, do hereby certify that the foregoing is a full, true, and correct transcript from the statement remaining on file in this office of the items of the expenses in the several cases named therein which were incurred by Custer county and chargeable to Yellowstone county on account of the expense of holding the April, 1883, term of the district court in this county.

Witness my hand and official seal this 11th day of October, 1883.

[SEAL.]

JAMES H. GARLOCK,
County Clerk,
By CHAS. DOUGLAS,
Deputy Clerk.

And thereafter, to wit, on the 17th day of April, 1884, the defendants filed their demurrer to the affidavit; which is in the words and figures following, to wit:

Title of cause.

Now come *the* William B. Webb, E. S. Tutt, and F. W. Lee, who are commissioners of the county of Yellowstone, and as such com-

missioners *and* demur to the affidavit filed therein and say
21 the said affidavit is not such nor does it set forth such facts as entitle said petitioners *for* the writ of mandate therein prayed, the said commissioners of Yellowstone county hereby reserving the right to further answer and thereof show cause if upon said affidavit the court shall adjudge they are entitled thereto.

SANDERS & CULLEN,
Att'ys for the Board of Commissioners of Yellowstone County.

And on the same day the defendants filed their motion for a change of venue, which is in the words and figures following, to wit:

Title of cause.

Now come the respondents in the above-entitled case, to wit, the commissioners of Yellowstone county, and move the court to transfer this application and a further trial thereof to the county of Gallatin or some other county in said district for the following reasons, to wit:

First. Said action is brought in the wrong county.

Second. Said controversy being the controversy between
22 the county of Yellowstone and the county of Custer, the same is not properly commenced, nor is it triable in said county of Custer nor in the county of Yellowstone.

SANDERS & CULLEN,
Att'ys for Yellowstone Co.

And afterwards, on the 25th day of April, 1885, the following entry was made in the order book of said court, to wit:

Title of cause.

Whereas the defendants, by their counsel, Sanders and Cullen, Esqrs., did, on the 24th instant, file their motion for a change of the place of trial in this cause from this court to the district court sitting in and for the county of Gallatin, *and* now at this day this cause came on to be heard upon the said motion, and, the same being argued by the respective counsel, it is ordered here by the court that the venue in this cause be, and is hereby, changed from this court to the district court sitting in and for the county of Gallatin, and that the clerk of this court do forthwith transmit to the clerk of said court in Gallatin county all the papers and pleadings
23 on file in this court, together with a certified copy of all orders of record therein, including a certified copy of this order.

And afterwards, to wit, on the 23rd day of April, A. D. 1885, one of the regular days of the March term, 1885, of said district court in and for Gallatin county (where this cause was duly docketed for trial), the following entry was made in the minutes of said court, to wit:

Title of cause.

Now come the parties, by their respective counsel, and the defendants having demurred to the petition herein, and the same, being argued by counsel and duly considered by the court, is by the court overruled; to which ruling the defendants duly except, and the defendants are ruled to answer in thirty days.

And on the same day the defendants' bill of exceptions was filed in the words & figures following, to wit:

Title of cause.

Bill of Exceptions.

24 Be it remembered that heretofore, to wit, on the 23d day of April, 1884, one William H. Bullard did file in the foregoing court his affidavit for a writ of mandate, which is in the words and figures following, to wit:

TERRITORY OF MONTANA, } ss:
County of Custer, }

William H. Bullard, being duly sworn, on oath deposes and says: I am a citizen and tax-payer of the county of Custer and Territory aforesaid and am above the age of twenty-one years. Deponent further says that he is one of the county commissioners of the said county of —, duly elected and qualified and acting as such, and that as such county commissioner he makes this affidavit for and on behalf of the board of commissioners of the said county of Custer, in pursuance of a resolution passed by the said board and adopted by them at an extra session thereof begun and holden at the county seat of said county on the 8th day of October, A. D. 1883.

Deponent further says that a large part of the territory and area embraced within the present county of Yellowstone, in said
25 Territory of Montana, was, previous to the organization of the said county of Yellowstone, a part of the county of Custer, in said Territory of Montana; that the said county of Yellowstone was created and organized under the provisions of an act of the Legislative Assembly of the Territory of Montana entitled "An act to create the county of Yellowstone and for the election of officers thereof," which said act was approved on the 26 day of February, A. D. 1883; that by the provisions of said act the said county of Yellowstone was attached to the said county of Custer for judicial purposes, and the officers of said Custer county were to act as officers of the said Yellowstone county, except as otherwise provided by said act, till the first day of May, A. D. 1883.

Deponent further says that while the said county of Yellowstone remained so united and attached to the county of Custer for judicial purposes, as aforesaid, there was, on the 10th day of April, A. D. 1883, at Miles City, the county seat of said county of Custer,

begun and holden a term of the district court of the third judicial district of the said Territory of Montana in and for the said
26 county of Custer and the county of Yellowstone; which said term of court was duly appointed to be held at the time and place last aforesaid; that at the term of court so held as aforesaid at the county of Custer there were brought and were pending and then and there tried and otherwise disposed of by the said court at said time a large number of causes from the said county of Yellowstone, on account of which was incurred a large part of the public expense of said terms of court; which said part of said expenses was incurred for and on account of and is chargeable to the said county of Yellowstone while the same was so attached to Custer county; and deponent further says that at the close of said term of court so held as aforesaid the Honorable Decius S. Wade, chief justice of said Territory, who was the presiding judge at said term of court, did make an inquiry as to what share of the public expense of said term of court so held as aforesaid was incurred for and on account of said county of Yellowstone and properly chargeable thereto; that upon said inquiry the said judge did find that the expenses of said
27 term in the following-named cases were incurred for and on account of the said county of Yellowstone—that is to say:

The Territory of Montana *vs.* Jeremiah Cokely.
" " " James Edwards.
" " " Henry Lump.
" " " Geo. A. McArthur.
" " " Daniel Leahey.
" " " James McKeever.
" " " John Sullivan.
" " " Gorden D. Tapper.
" " " Henry Luke.
" " " H. C. Boker.

And deponent further says that the said court and the judge thereof did thereupon at the said term of court aforesaid rule that the board of county commissioners of the county of Yellowstone reimburse the said county of Custer all costs, charges, and public expenses incurred at said term of court aforesaid in all of the cases herein named, and the said court and the judge thereof did further order that the said board of commissioners of the said county of Yellowstone draw their warrant on the treasurer of their said
28 county against the general fund thereof, payable to the county commissioners of the county of Custer, for said expenses and forward the same to the county treasurer of the said Custer county.

And did further order that the clerk of said court should, as soon as practicable, furnish the board of commissioners of each of the said counties of Yellowstone and Custer a statement of the items of the said expenses incurred in the said causes, all of which will more fully appear by reference to the said order of the said judge, a full and true copy of which said order taken from the records of said court is hereto attached and marked Exhibit "A," and for the purposes of this application is made a part of this affidavit. Deponent further says that the clerk of said court did thereupon and

in pursuance of such order furnish to each of the said counties aforesaid a statement of the several items of expense chargeable to the said county of Yellowstone, as was by the said order required that he should, a true copy of which said statement of items of expense so furnished by said clerk is hereto annexed and marked Exhibit "B," and for the purposes of this application is made a part of this affidavit; and deponent says that in fact and as by said bill of items of expense appears there were incurred at the said term of court aforesaid by the said county of Custer for and on account of the said county of Yellowstone in and about the said causes before named expenses amounting to the sum of $5,812.20; that said sum became due and thereupon was due and payable to the said county of Custer in warrants drawn upon the treasurer of the said county of Yellowstone against the general fund thereof and payable to the county commissioners of the said county of Custer.

But deponent further says that though the said bill of items of costs and expenses so incurred by the said county of Custer as aforesaid was long since furnished by the clerk of the said court both to the board of commissioners of the county of Yellowstone and also to the board of commissioners of the county of Custer, and although requested, the said board of commissioners of the county of Yellowstone, wholly disregarding the said order of the said judge and in disobedience of the said order, have refused and still do refuse to draw a warrant for the said sum so due the said county of Custer as aforesaid, or for any part thereof.

And finally deponent says that, there being no plain, speedy, and adequate remedy in the ordinary course of law and the premises, he, in pursuance of a resolution of the board of commissioners of the county of Custer, adopted October 8, 1883, makes this affidavit and asks that a writ of mandamus may be issued out of the said court first above mentioned on the behalf and relation of the board of commissioners of said county of Custer, directed to the county commissioners of the said county of Yellowstone, commanding them that they, the board of commissioners of the said Yellowstone county, do cause a warrant to be drawn on the county treasurer of their said county against the general fund of said county for the said sum of five thousand eight hundred twelve and $\frac{20}{100}$ dollars ($5,812.20), payable to the county commissioners of the said county of Custer, as by the said order required, and in satisfaction and payment of the expenses incurred by the said county of Custer, as hereinbefore set forth.

W. H. BULLARD,
County Commissioner.

Subscribed and sworn to before me this 5th day of March, A. D. 1884.

[SEAL.]

THEO. MUFFLY,
Clerk 1st Judicial District,
By CHAS. DOUGLAS,
Deputy Clerk.

And thereafter the commissioners of Yellowstone county, having been notified of the said application and affidavit, did file in this court their demurrer to the same; which demurrer is in the words and figures following—that is to say:

Title of cause.

Now come *the* William B. Webb, E. S. Tutt, and F. W. Lee, who are commissioners of the county of Yellowstone, and as such commissioners *and* demur to the affidavit filed therein and say the said affidavit is not such nor does it set forth such facts as entitle said petitioners *for* the writ of mandate therein prayed—

The said commissioners of Yellowstone county hereby reserving the right to further answer and thereof show cause if, upon said affidavit, the court shall adjudge they are entitled thereto.

SANDERS & CULLEN,

32 *Attorneys for the Board of Commissioners of Yellowstone County.*

And thereafter, on the 23d day of April, 1885, the same came on to be heard in said court; on consideration whereof the court overruled said demurrer; to which ruling the said respondents, The Commissioners of Yellowstone County, then and there excepted, and prays that this their bill of exceptions be signed, sealed, and made a part of the record, which is done accordingly.

JOHN COBURN, *Judge.* [SEAL.]

And on the 9th day of May following an altern-tive writ of mandate was issued herein, which, together with the sheriff's return of the same, is in the words and figures following, to wit:

Title of cause.

The People of the Territory of Montana to the board of commissioners of the county of Yellowstone, Greeting:

Whereas it manifestly appears to us by the affidavit of Wil-

33 liam H. Bullard that there is justly due to the said commissioners of Custer county from the said commissioners of Yellowstone county the sum of five thousand eight hundred twelve and twenty-hundredths dollars, and that there is not a plain, speedy, and adequate remedy in the ordinary course of law: Therefore we do command you that immediately after the receipt of this writ you cause a warrant to be drawn on the treasurer of the said county of Yellowstone against the general fund of said county for the said sum of five thousand eight hundred twelve and twenty-hundredths dollars, payable to the county commissioners of said county of Custer, or that you show cause, before this court, at the court-room thereof, in the court-house in the city of Bozeman, county of Gallatin, on the nineteenth day of October, A. D. 1885, at the opening of the court on that day, why you have not done so, and that you file answer herein with the clerk of this court within thirty days after the receipt of this writ.

Witness the Honorable John Coburn, judge of the first judicial district of the Territory of Montana, and the seal of said court this 9th day of May, A. D. 1885.

THEO. MUFFLY, *Clerk*,
[SEAL.] By E. M. GARDNER,
Deputy Clerk.

34 SHERIFF'S OFFICE, YELLOWSTONE COUNTY, M. T.

I hereby certify that I received the within writ on the twentieth day of June, A. D. 1885, and personally served the same by reading the said original writ to the clerk of The Board of Commissioners of Yellowstone County, the defendant named therein, and delivering to him a true copy thereof on the twentieth day of June, A. D. 1885.

Dated this twentieth day of June, A. D. 1885.

JOHN R. KING,
Sheriff Yellowstone County.

Service	1 00
Milage	40

And on the 23rd day of May, A. D. 1885, the defendant filed its answer, which is in the words & figures following, to wit:

Title of cause.

Now comes the defendant above named, and, showing cause why it should not be compelled to draw its warrant as in the alternative writ of mandamus herein commanded, *and* for answer thereto says:

1. That it is a municipal corporation existing by and under the provisions of an act of the Legislative Assembly of the Ter-
35 ritory of Montana entitled "An act to create the county of Yellowstone and for the election of officers thereof," approved February 26, 1883.

And defendant says that said plaintiff ought not to have the relief in said writ required and demanded, because it says that all of the services mentioned and set forth in plaintiff's itemized account herein are for services rendered in prosecuting the sundry persons therein named for offenses committed in the said county of Custer, and not otherwise, to wit, the item of fees therein in case of The Territory *vs.* Jeremiah Cokely was for services rendered in a prosecution of said defendant for the crime of larceny committed on or about December 25, A. D. 1882, in said county of Custer, and not elsewhere. The item for fees, &c., in case of Territory *vs.* Henry Lump was a prosecution of said defendant for the crime of murder committed on or about September —, A. D. 1882, in said county of Custer, and not elsewhere. The items charged in two cases of The Territory *vs.* John Sullivan were incurred for the prosecution of said defendant for the crime of robbery alleged to have been
36 committed on or about the 24 day of March, A. D. 1883, in the county of Custer aforesaid and not elsewhere. The items

therein charged for fees in case of Territory *vs.* James Edwards and James McKeever were incurred in a prosecution of said defendants for a robbery alleged to have been committed on or about the — day of January, A. D. 1883, in said county and not elsewhere. The items for fees therein charged in the case of The Territory *vs.* Daniel Leahey were incurred in a prosecution of said defendant for the crime of murder alleged to have been committed on or about June 1st, 1882, in said Custer county and not elsewhere. The items therein charged in the case of The Territory of Montana *vs.* Geo. A. McArthur were for services rendered in the prosecution of said defendant for the crime of murder alleged to have been committed by him on or about the 3rd day of November, A. D. 1882, in said Custer county and not elsewhere.

The items charged therein in the case of The Territory of Montana *vs.* H. C. Baker are for services rendered in the case of prosecution of said defendant for some offence alleged to have
37 been committed in said Custer county long prior to the organization of this defendant, and that the item of discharging Gorden D. Tapper in said account mentioned is not chargeable to this defendant because no such person was discharged at said date from custody in Yellowstone county.

And defendant, on information and belief, alleges that the witnesses' fees in said itemized account mentioned and set forth are amounts allowed to the several persons therein named as witnesses in the said several cases in said statement mentioned and hereinbefore specifically set forth; that no part of the sum so allowed or paid is chargeable to this defendant nor were said persons or either of them witnesses in any case of an offence committed in Yellowstone county.

4. And defendant, further answering, says that said plaintiff ought not to have the relief in said writ of mandamus commanded, because it says it appears in and by said itemized statement that all the services therein charged for were rendered before this defendant had any legal existence for judicial purposes.

38 5. And defendant, further answering, says that said plaintiff ought not to have the relief in said writ of mandamus mentioned for the reason that the following items embraced in said account are and each of them is extortionate and illegal, to wit:

In case of Territory *vs.* Jeremiah Cokely:

	Return, 50; taking into court, 50	1 00
Ap'l 21.	Copies subp's, 1.50; ret., 50	2 00
" 23.	Com'it'g & discharging	1 00
" 25.	Copy subp., 50; return, 50	1 00
" "	Com'it'g & disch'g during trial	2 00
" "	" " " "	1 00
" "	Discharge	50
		$8 50

In case of Territory *vs.* Henry Lump:

Ap'l 18.	Copies subp's	2 00
	Ret. 50; copy subp., 50; ret., 50	1 50
	Copy subp., 50; ret., 50	1 00
	Commit'g & disch'g (overcharge, $1.00)	1 00
	Copies subp's, 3.00; ret., 50	3 50
	Copies of subp., 1.00; ret., 50	1 50
Ap'l 21.	Commit'g & discharging	2 00
" 22.	Discharging	50
		$13 00

39 Territory *vs.* John Sullivan:

Ap'l 14.	Return (bench warrant)	50
	Taking into court	1 00
	Commit. & disch'g (overcharge)	1 00
17.	Copies subp's, 1.50; return, 50	2 00
	" " 2.00; " 50	2 50
20.	" " 50; " 50	1 00
	" " 50; " 50	1 00
24.	" " 50; " 50	1 00
	Commit. & disch'g during trial	1 00
26.	" " " "	1 00
	Discharging	50
		$12 00

Territory *vs.* James Edwards & J. McKeever:

Ap'l 14.	Return (bench warrant)	50
	Taking into court	1 00
	Commit. & discharging, 2.00 (overcharge)	1 00
20.	Copies subp's, 2.00; ret., 50	2 50
21.	" " 1.50; " 50	2 00
	" " 1.00; " 50	1 50
24.	Commit. & discharging	4 00
26.	" "	2 00
	Discharge	1 00
		$15 00

40 Territory *vs.* Daniel Leahey:

Ap'l 11.	Copies subp's, 4.50; mil. to Bozeman (excess), 17.20	21 70
	Copies 3.00; mil. to junction, $44.00; ret., 50	47 50
16.	Copy subp., 50; ret., 50	1 00
18.	Commit. & discharging	1 00
19.	" "	1 00
	Copy subp., 50; ret., 50	1 00
	Ret., 50; discharge by suicide, 50	1 00
		$74 50

Territory *vs.* Geo. A. McArthur:

Ap'l 14.	Ret. (bench warrant), 50; to court, 50	1 00
16.	Copies subp's, 2.50; ret., 50	3 00
	Mileage to Livingston (excess)	15 20
20.	Copies sub'p, 1.00; ret., 50	1 50
	" " 1.50; " 50	2 00
	Commit. & disch'g trial	3 00
29.	Discharge	50
		$26 50

Territory *vs.* H. C. Baker:

Ap'l 14.	Ret. (bench warrant)	50
	Taken into court	50
	Discharge	50
		$1 50

41 And defendant, further answering on information and belief, says that the amounts allowed to sundry witnesses in said account are largely in excess of the number of miles actually travelled by said witnesses, and the same is extortionate and illegal.

Wherefore defendant asks to be hence dismissed and to have judgment for its costs.

SAM'L WILDE AND
SANDERS, CULLEN & SANDERS,
Att'ys for Def't.

MONTANA TERRITORY, }
Yellowstone County, } ss:

Wm. B. Webb, being first duly sworn, says: I am one of the board of commissioners of said Yellowstone county. I have read the foregoing answer and know the contents thereof, and the same is true to my own knowledge, except as to those matters therein stated on my information and belief, and as to such matters I believe it to be true.

WM. B. WEBB.

Subscribed & sworn to before me this 20th day of May, A. D. 1885.

[SEAL.] E. N. HARWOOD,
Notary Public.

42 And afterwards, to wit, on the 19th day of October, 1885, the plaintiff filed its demurrer to said answer; which said demurrer is in the words and figures following, to wit:

Demurrer.

Title of cause.

And now comes the plaintiff in the above-entitled cause and demurs to the answer of the defendant filed therein on the 23d day

of May, 1885, and for cause or ground of demurrer alleges that said answer does not state facts sufficient to constitute either a defense or counter-claim.

STREVELLE & GARLOCK,
Att'ys for Pl'ff.

And afterwards, on the 30th day of October, the following entry was made in the minutes of said court, to wit:

Title of cause.

Now come the parties, by their respective counsel, and the plaintiffs having filed their demurrer to the defendant's answer, and the same having been argued by counsel and submitted, upon due consideration by the court the said demurrer is sustained; to
43 which ruling of the court the defendant then and there duly excepted.

Thereupon the opinion of the court was rendered in writing and was duly filed by the clerk, and the same is in the words and figures following, to wit:

Title of cause.

It was the duty of the district judge at the close of each term to make inquiry as to what part of the public expense of such term was incurred for and on account of the county or counties attached or litigants therefrom, and to apportion the same and to make an order directing the reimbursement to the county, naming such expense by the county so attached, &c. This duty he performed at the time. It was by virtue of this special authority that he acted. He acted for both counties. He had jurisdiction of the subject, the time of the investigation was fixed by statute, was known and public, known to both counties. Neither had superior advantages. Both stood in court on the same footing. The court acted; no appeal was taken; no proceeding was taken to set aside his action. It stands without protest, objection, or attack—a valid act of a duly authorized officer, having ample and plenary jurisdiction,
44 and cannot be attacked collaterally in this proceeding. The judgment then rendered is as binding upon all parties as any judgment could be, and must be recognized by this court as a final adjdication of this matter.

On the 6th day of November, A. D. 1885, the defendant filed its bill of exceptions, which is in the words and figures following, to wit:

Bill of Exceptions.

Title of cause.

Be it remembered that to the affidavit & petition for a mandamus heretofore filed herein by the commissioners of Custer county the commissioners of Yellowstone county, on the 23d day of May, 1885,

filed their answer and return why said mandamus should not issue in the words and figures following—that is to say:

(See answer, page — of this transcript.)

To which said answer and return the said commissioners of Custer county filed their demurrer in the words and figures following, to wit:

(See demurrer, at page — of this transcript.)

And thereafter, on the 30th day of October, A. D. 1885,
45 the said demurrer came on to be heard and was argued by counsel; on consideration whereof the court sustained said demurrer; to which ruling of the court the commissioners of Yellowstone county then and there excepted, and pray that this their bill of exceptions be signed, sealed, and made a part of the record, which is done accordingly.

JOHN COBURN, *Judge.*

And thereafter, on the 7th day of November, A. D. 1885, the order for a peremptory writ of mandate was filed and entered; which order is in the following words & figures, to wit:

Order for Peremptory Writ of Mandate.

Title of cause.

At a regular term of said court, begun and holden at the court-house, in Bozeman, the county seat of said county, on the third Monday of October, 1885.

Present: Hon. John Coburn, associate justice of said Territory.

The matter of the application of the board of commissioners of the county of Custer for a writ of mandate against the board of commissioners of the county of Yellowstone having come
46 on to be heard on the 30th day of October, 1885, upon the affidavit of William H. Bullard for and on behalf of said board of commissioners of said county of Custer, the party beneficially interested, and the demurrer of said last-named board to the answer and return of said board of commissioners of said county of Yellowstone to the alternative writ of mandate heretofore issued out of said court in said cause, the court, after having heard the argument of counsel, Messrs. Strevelle & Garlock, appearing for said board of commissioners of said county of Custer, and Messrs. Sanders and Cullen & E. W. & J. K. Toole and William Wallace, Jr., for said board of commissioners of the county of Yellowstone, and after due deliberation thereon and being fully advised in the premises, *the court* thereupon and on the 30th day of October, 1885, sustained said demurrer; and afterwards, on the 7th day of November, 1885, said board of commissioners of said county of Yellowstone not having either asked or obtained leave to further answer to said alternative writ or said affidavit, the court thereupon proceeds to hear the application of said board of commissioners of said county

of Custer for a peremptory writ of mandate upon the matters
47 in said affidavit alleged, whereupon the court, after having heard said application and now here being fully advised in the premises, finds that the county of Yellowstone, in said Territory, being attached to said county of Custer for judicial purposes from the 26th day of February, 1883, until the first day of May, 1883, there was begun and holden, on the tenth day of April, 1883, at Miles City, the county-seat of said county of Custer, a term of the district court of the third judicial district of said Territory in and for said counties of Custer and Yellowstone, in which district said counties were then embraced and included, duly appointed to be held, at which said term of said court there were brought and were pending and were then and there tried and otherwise disposed of a large number of causes from said county of Yellowstone, on account of which was incurred a large part of the public expenses of said term, which said part of said expense was incurred by said county of Custer for and on account of said county of Yellowstone and charg-able thereto; that at the close of said term the justice presiding at said term did make inquiry as to what share of said expense was incurred for and on account of said county of Yellowstone and litigants therefrom, and did thereupon find
48 that all the said expenses of said term in the causes following, that is to say: Territory of Montana *vs.* Jeremiah Cokely, Territory of Montana *vs.* James Edwards, Territory of Montana *vs.* Henry Lump, Territory of Montana *vs.* George A. McArthur, Territory of Montana *vs.* James McKeever, Territory of Montana *vs.* Daniel Leahey, Territory of Montana *vs.* John Sullivan, Territory of Montana *vs.* H. C. Baker, Territory of Montana *vs.* Gorden D. Tupper, Territory of Montana *vs.* Henry Luke, was incurred for and on behalf of said county of Yellowstone.

And the court further finds that said justice presiding at said term did thereupon order that the board of county commissioners of said county of Yellowstone reimburse to said county of Custer all costs, charges, and public expenses incurred at said term in said causes; and did further order that said board of commissioners of said county of Yellowstone draw their warrant on the treasurer of their said county against the general fund thereof, payable to the county commissioners of said county of Custer, for said expense, and did further order that the clerk of said court furnish the board of commissioners of each of said counties a statement of the items
49 of such expense; that there was in fact, and as by said statement appears, incurred at said term of the expenses thereof, by said county of Custer on account of said county of Yellowstone in said causes, expenses amounting to the sum of five thousand eight hundred and twelve and twenty-hundredths dollars; that said sum became and thereupon was due and payable to said Custer county, as is by the statute of this Territory in such case provided, by warrants drawn upon the treasurer of said Yellowstone county against the general fund thereof, payable to the county commissioners of said county of Custer.

And, further, that said board of commissioners of said county of

Yellowstone, notwithstanding said order and in disobedience thereof and notwithstanding the fact that a statement of the items of said expense was furnished to said board of commissioners of the county of Yellowstone, as was in and by the said order required, have hitherto failed, neglected, and refused to pay the said sum or any part thereof, either by a warrant so drawn as aforesaid or in any manner whatsoever; and finally that there is no plain, speedy,
50 and adequate remedy in the ordinary course of law in the premises.

Now, on motion of said counsel for said board of commissioners of said county of Custer, the counsel for said board of commissioners of said county of Yellowstone appearing in opposition thereto, it is ordered that a peremptory writ of mandate issue out of and under the seal of this court, directed to said board of commissioners of the county of Yellowstone, commanding said board and the members thereof that they do, upon the first day of the next regular session of said board, after service upon them of said writ, draw and cause to be drawn on the county treasurer of their said county and against the general fund thereof a warrant of said county for the sum of five thousand eight hundred and twelve and twenty-hundredths dollars in favor of the county commissioners of said county of Custer, and that they do forthwith forward the same to the county treasurer of said county of Custer; and, further, that said board of commissioners of said county of Yellowstone make return of their obedience to and execution of said writ to this court on the
51 first day of the first term thereof next to be holden thereafter; and, further, that said board of commissioners of said county of Yellowstone further pay to said board of commissioners of said county of Custer the sum of —— dollars, their costs in this proceeding incurred.

JOHN COBURN, *Judge.*

Entered Nov. 7, 1885.

And thereafter, on the same day, a peremptory writ of mandate was issued, which writ is in the words and figures following, to wit:

Title of cause.

Peremptory Writ of Mandate.

The Territory of Montana to the Board of Commissioners of the County of Yellowstone, in said Territory, Greeting:

Whereas the board of commissioners of the county of Custer, in said Territory, did, on the twentieth day of April, 1884, in the district court of the first judicial district of the Territory of Montana in and for the county of Custer, cause to be filed for, and on behalf of said board of commissioners of said county and in pursuance of a resolution of said board duly adopted, an affidavit duly
52 subscribed and sworn to by William H. Bullard, one of the county commissioners of said county, praying that a writ of

mandate issue out of said court on the behalf and relation of said board of commissioners, directed to the board of commissioners of the county of Yellowstone, in said Territory, commanding you, the said board of commissioners of said last-named county, that you cause to be issued a warrant to be drawn on the county treasurer of your said county and against the general fund thereof for the sum of five thousand eight hundred twelve and twenty-hundredths dollars, payable to the county commissioners of the county of Custer, in pursuance of the order hereinafter mentioned and in obedience thereto.

And whereas the said matter of the application for said writ, having theretofore, upon your motion, been transferred to the district court of said first judicial district of said Territory in and for the county of Gallatin for hearing and determination, came on to be heard before the court on the 30th day of October, 1885, upon the demurrer of said board of commissioners of the county of Custer to your answer to the alternative writ of mandate heretofore
53 issued therein; whereupon the court, upon due consideration and deliberation, after argument of counsel for the respective parties, sustained said demurrer, and, no leave being asked or granted to further answer to said alternative writ, the court, upon further hearing of said application on the 7th day of November, 1885, and upon due consideration thereof, doth find that the county of Yellowstone, in said Territory, *being* attached to said county of Custer for judicial purposes from the twenty-sixth day of February, 1883, thenceforward until the first day of May, 1883, — there was begun and holden on the tenth day of April, 1883, at Miles City, the county seat of said county of Custer, a term of the district court of the third judicial district of said Territory in and for said counties of Custer and Yellowstone, in which district said counties were then embraced, duly appointed to be held, at which said term of said court there were brought and were pending and were then and there tried and otherwise disposed of a large number of causes from said county of Yellowstone, on account of which was incurred a large part of the public expense of said term, which said part of said expense was incurred for and on
54 account of said county of Yellowstone and charg-able thereto; that at the close of said term the justice presiding at said term did make inquiry as to what share of said expense was incurred for and on account of said county of Yellowstone and litigants therefrom, and did thereupon find that all the said expense of said term in the cases following—that is to say, Territory of Montana *vs.* Jeremiah Cokely, Territory of Montana *vs.* James Edwards, Territory of Montana *vs.* Henry Lump, Territory of Montana *vs.* George A. McArthur, Territory of Montana *vs.* James McKeever, Territory of Montana *vs.* Daniel Leahey, Territory of Montana *vs.* John Sullivan, Territory of Montana *vs.* H. C. Baker, Territory of Montana *vs.* Gordon D. Tupper, Territory of Montana *vs.* Henry Luke—was incurred for and on account of said county of Yellowstone; and whereas the court doth further find that said justice presiding at said term did thereupon order that the board of county commissioners of said

county of Yellowstone reimburse to said county of Custer all costs, charges, and public expenses incurred at said term in said cases,
and did further order that said board of commissioners of
55 said county of Yellowstone draw their warrant on the treasurer of their said county against the general fund thereof, payable to the county commissioners of said county of Custer, for said expenses, and did further order that the clerk of said court furnish the board of commissioners of each of said counties a statement of the items of said expense; that there was in fact, and as by the said statement appears, incurred at said term of the expenses thereof by said county of Custer on account of said county of Yellowstone in said causes expenses amounting to the sum of five thousand eight hundred and twelve and twenty-hundredths dollars; that said sum became and thereupon was due and payable to said county of Custer, as is by the statute of this territory in such case provided, by warrants drawn upon the treasurer of said Yellowstone county against the general fund thereof, payable to the county commissioners of said county of Custer; that you, the said board of commissioners of said county of Yellowstone, notwithstanding the said order and in disobedience thereof and notwithstanding the fact that a statement of the items of said expense was furnished to you,
as was in and by the said order required, have hitherto failed,
56 neglected, and refused to pay the said account and claim or any part thereof, either by a warrant so drawn as aforesaid or otherwise; and, finally, that there is no plain, speedy, and adequate remedy in the ordinary course of law in the premises:

Now, therefore, we do command you, the board of commissioners of said county of Yellowstone, that you do, upon the first day of the next regular session of your said board after service upon you of this writ, draw and cause to be drawn on the county treasurer of your said county and against the general fund thereof a warrant of your said county for the sum of five thousand eight hundred and twelve and twenty-hundredths dollars in favor of the county commissioners of said county of Custer, and do forthwith forward the same to the county treasurer of said last-named county, and, further, that you certify and make return of your perfect obedience to and due execution of this writ to our said court on the first day of the first term thereof next to be holden thereafter, and have you then and there this writ.

Witness the Hon. John Coburn, associate justice of said
57 Territory and judge of the first judicial district of said Territory in and for the county of Gallatin, at the court-house, in Bozeman, the county-seat of said county, and the seal of said court this 7th day of November, A. D. 1885.

[SEAL.] THEO. MUFFLY, *Clerk*,
By E. M. GARDNER,
Deputy Clerk.

Thereafter, on the 19th day of November, 1885, the defendants filed herein in the office of the clerk of said court their notice of appeal, which is in the words and figures following, to wit:

Notice of Appeal.

Title of cause.

You will please take notice that the defendant, The Board of Commissioners of Yellowstone County, in the above-entitled proceeding or action hereby appeals to the supreme court of the Territory of Montana from a judgment or order finally determining the rights of the parties therein, to wit, an order for a peremptory writ of mandamus in the said action and in the district court of the 1st judicial district of the Territory of Montana in and for said county of Gallatin on the 7th day of November, 1885, made and
58 entered in favor of said plaintiff and against said defendant and from the whole thereof.

SANDERS, CULLEN & SANDERS,
E. W. & J. K. TOOLE, &
WM. WALLACE, JR.,
Att'ys for Defendant.

Dated this 19th day of November, 1885.

TERRITORY OF MONTANA, } ss:
County of Gallatin, }

Wm. Wallace, Jr., being duly sworn, makes oath and says that he is one of the attorneys of the defendant in the foregoing notice of appeal named; that all of the attorneys of said defendant reside in the city of Helena, in the county of Lewis & Clarke, of the Territory of Montana, and that Messrs. Strevelle & Garlock, the attorneys of plaintiff therein named, reside in Miles City, in the county of Custer, of the Territory of Montana; that between the said city of Helena and the said Miles City and between the city of Bozeman, in the county of Gallatin, aforesaid, and the said Miles City there is a regular and daily communication by mail through the mail service of the United States; that affiant did, on the 19th day of
59 November, 1885, serve the foregoing notice of appeal upon said Strevelle & Garlock by depositing an exact copy of said notice, addressed to said Strevelle & Garlock, at Miles City, Custer county, Montana, with full postage thereon prepaid in the United States post office, in the city of Bozeman, in the county of Gallatin, aforesaid; and further affiant saith not.

WM. WALLACE, JR.

Subscribed and sworn to before me this 19th day of November, 1885.

E. M. GARDNER,
Deputy Clerk.

And prior to the filing of said notice of appeal, to wit, on the 18th day of November, 1885, the following order of the court was entered in the minutes of said court, to wit:

Title of cause.

"In this case, it appearing that the defendants are persons acting in another's right, it is ordered that security on appeal be dispensed with."

60 TERRITORY OF MONTANA, } ss:
County of Gallatin, }

I, Theo. Muffly, clerk of the district court of the first judicial district of the Territory of Montana in and for the county of Gallatin, do hereby certify that the foregoing 59 pages, numbered from 1 to 59, inclusive, contain a full, true, and correct transcript of certain of the pleadings, records, and proceedings filed, made, and had in said court in the cause of The Territory of Montana *ex rel.* Board of Commissioners of Custer County *vs.* Board of Commissioners of Yellowstone County.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said court at my office, in Bozeman city, on this 19th day of December, A. D. 1885.

THEO. MUFFLY, *Clerk*,
By E. M. DUNPHY,
Deputy Clerk

61 In the Supreme Court of Montana Territory. January Term, 1886.

TERRITORY OF MONTANA *ex rel.* BOARD OF COMMISSIONERS OF CUSTER COUNTY, Respondent,
vs.
THE BOARD OF COMMISSIONERS OF YELLOWSTONE COUNTY, Appellant.

Be it remembered that in the present term of January, in the year of our Lord one thousand eight hundred and eighty-six, the above-entitled cause was brought into the supreme court by virtue of an appeal agreeably to the statute of said Territory and the rules of said court in such cases provided; and said cause, coming on to be heard before the court on the transcript of the record filed in said cause, was argued by counsel.

Thereupon the court took said cause under advisement; and afterwards, said cause coming on for decision and judgment on appeal, the court delivered its opinion in writing, of which the following is a copy, to wit:

62 In the Supreme Court of Montana Territory. January Term, 1886.

TERRITORY OF MONTANA *ex rel.* BOARD OF COMMISSIONERS OF CUSTER COUNTY, Petitioner & Respondent,
vs.
THE BOARD OF COMMISSIONERS OF YELLOWSTONE COUNTY, Appellant.

Appeal from Gallatin county, first judicial district.

WADE, *C. J.:*

This is an application for a writ of mandate in which the relator substantially sets forth that a large part of the territory and area embraced within the present county of Yellowstone was, previous to the organization of Yellowstone county, a part of Custer county; that Yellowstone county was created and organized under the provisions of an act of the Legislative Assembly of the Territory approved on the 26th day of February, 1883; that by the provisions of said act the county of Yellowstone was attached to the
63 county of Custer for judicial purposes, and the officers of Custer county were to act as officers of Yellowstone, except as otherwise provided by said act, until the first day of May, 1883; that while Yellowstone county remained so attached to the county of Custer for judicial purposes there was, on the 10th day of April, 1883, at Miles City, the county seat of Custer county, begun and holden a term of the district court of the third judicial district in and for said county of Custer and the county of Yellowstone, which said term of court was duly appointed to be held at the time and place aforesaid; that at the term of said court there were brought and were pending and then and there tried and otherwise disposed of by said court a large number of causes from the county of Yellowstone, on account of which was incurred a large part of the public expenses of said term, which expenses were incurred for and on account of and are charg-able to the county of Yellowstone while the same was so attached to Custer county; that at the close of said term of court the judge thereof made enquiry as to what share of the public expense of said term was incurred for and on account of said Yellowstone county and properly charg-able thereto; that upon said enquiry said judge did find that the
64 expenses of said term in certain cases, which are named and set forth in said application, were incurred for and on account of the said county of Yellowstone; that thereupon the said court and the judge thereof did rule that the board of county commissioners of Yellowstone county reimburse the county of Custer all costs, charges, and public expenses incurred at said term of court in all the cases so named in said application; that the said court and the judge thereof did further order that the said board of commissioners of said Yellowstone county draw their warrant on the treasurer of their said county against the general fund thereof, pay-

able to the county commissioners of the county of Custer, for said expenses, and forward the same to the treasurer of Custer county, and did further order that the clerk of said court should, as soon as practicable, furnish the board of commissioners of each of said counties a statement of the items of said expenses incurred in said causes, a copy of which order and itemized statement are attached to and form a part of said application; that the amount of said expenses is $5,812.20; that the commissioners of Yellowstone county
65 refuse to draw a warrant therefor in pursuance of said order; that the county of Custer has no speedy or adequate remedy at law; whereupon relator prays for a writ of mandamus.

There was a demurrer to the application overruled and an alternative writ of mandate issued, and an answer in which the appellant alleged in substance that it is a municipal corporation, existing by and under the provisions of an act of the Legislative Assembly of Montana entitled An act to create the county of Yellowstone and for the election of officers thereof, approved February 26, 1883; that relator ought not to have the relief in the writ required and demanded because all the services mentioned and set forth in said application are for services rendered in prosecuting the sundry persons therein named for offenses committed in Custer county and not otherwise, and then follows an allegation as to each case named in the application, showing that the crime for which the defendant was tried was committed in the county of Custer prior to the passage of the act creating the county of Yellowstone; but there is no denial of the allegation of the application that the cases named
66 therein belonged to the county of Yellowstone after the same had been created by the act aforesaid, nor that the judge of said court at the close of said term made an inquiry as to what share of the public expenses of said term of court were incurred for and were properly charg-able to Yellowstone county, and no denial that the judge found upon said inquiry that the expenses incurred in the cases named in the application and answer were properly charg-able to Yellowstone county.

The answer alleges that certain of the items in said amount which are set forth are extortionate and illegal, and that the amounts allowed to sundry witnesses for milage were in excess of the number of miles travelled by said witnesses and are illegal.

There was a demurrer to the answer sustained and, the appellant abiding its answer, a peremptory writ was issued.

The statute under which this proceeding is had provides that whenever a term of the district court shall be held in any county in this territory and another county is attached to such county for judicial purposes, at the close of each term it shall be the
67 duty of the justice presiding at such term to make an inquiry as to what share of the public expense of such term was incurred for and on account of the county or counties so attached or litigants therefrom and to apportion the same and to make an order directing the reimbursement to the county incurring such expense by the county so attached, and it shall be the duty of the board of county commissioners of the attached county to draw their warrant

on the treasurer of their county out of their general fund, payable to the county commissioners of the county incurring said expense, and to forward the same to the treasurer of the county, who shall make report thereof to the board of county commissioners of his county as soon as the same shall be received; and the said warrants shall be paid in due course as is provided by law; and the said district court is authorized to make any and all necessary orders for carrying this section into effect as equality and justice may require.

Rev. Stats., 537, sec. 603.

The statute further provides that the writ of mandamus may be issued by any court in this Territory, except a justice's, probate, or mayor's court, to any inferior tribunal, corporation, board,
68 or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station in all cases where there is not a speedy, plain, and adequate remedy in the ordinary course of the law.

Code Civ. Proc., sects. 547, 548, 549.

There is nothing contained in the answer that tends to impeach or in any manner to invalidate the finding of the judge, who made inquiry in pursuance of the statute concerning what part of the public expenses of said term of court were properly charg-able to Yellowstone county. In such inquiry the judge acts for both counties, and there is nothing in the answer to show but that both counties were represented at such hearing and inquiry. There was no objections to the findings and no appeal from the order. This inquiry was a hearing in pursuance of law and the findings resulting therefrom are final for the purposes of this proceeding; they cannot be attacked collaterally.

Upon such inquiry it was found by the judge that the expenses of said term of court in the cases named in the application of relator were incurred for and on account of Yellowstone county.
69 That is equivalent to a finding that the cases named originated in and belonged to Yellowstone county and were tried at the court in Custer county, while the former was attached to the latter county, for judicial purposes. It is only in such cases that the judge makes inquiry concerning expenses. The allegations of the answer that these crimes were committed in Custer county, which by the duties alleged were prior to the organization of Yellowstone county out of the territory of Custer county, is no denial that these cases were properly tried as belonging to Yellowstone county. These allegations were simply to the effect that these crimes were committed before the county of Yellowstone was created, and are an admission that they were committed within the territory which forms that county. If it had denied or questioned that these cases belonged to Yellowsfone county, then that county ought to have appeared before the judge and presented its objections to being charged with said expenses. There seems to be no question but that these cases properly belonged to Yellowstone county and that the defendants named were properly indicted and tried as of

that county attached to Custer for judicial purposes, and no
70 good reason or even excuse is shown why Yellowstone county did not pay the lawful expenses consequent upon said trials, as required to do by the law and the order of the judge.

The Legislature had authority to create Yellowstone county out of the territory of Custer county and to attach it to Custer for judicial purposes, and when this had been done the general statute concerning cases where one county is attached to another for judicial purposes applies and determines how and in what manner the public expenses of terms of court for such counties shall be paid. After the judge has made inquiry and found what part of the expenses of a term of court should be paid by the county attached to another for judicial purposes, and made an order directing reimbursement to the county incurring such expenses by the county so attached, then it becomes the duty of the board of commissioners of the attached county to draw their warrant on the treasurer of their county out of the general fund, payable to the commissioners of the county incurring such expenses, and forward the same to the treasurer of the county.

After the judge has made the order directing reimbursement
71 of the county incurring the expenses the duty of the commissioners of the attached county to draw their warrant in payment of such expenses becomes imperative and absolule. It is a duty that the law especially enjoins. It is a duty resulting from their office as county commissioners. It is the office of the writ of mandate to compel the performance of such duties. Under the allegations of the application, which are not denied by the answer, it became the duty of the commissioners of Yellowstone county to draw their warrant in favor of Custer county for the payment of the expenses named. It was a duty specially enjoined by law. It was a duty directly resulting from their office. They had no discretion in the premises. Like a clerk who has been ordered by the court to issue an execution upon a judgment, they had no right to question the propriety of the order. It is such plain, unquestionable official duties that the writ of mandate compels to be performed.

The statute provides that the court may make "any and all necessary orders" for carrying the section in question into effect. Proceeding in mandamus is one of the appropriate remedies for
72 this purpose. It is immaterial whether such "necessary orders" are procured by proceedings in mandamus or by any other legal proceeding. Procuring the necessary order in a legal manner is the material thing, and mandamus is an appropriate remedy.

The order directing the issuance of a peremptory writ of mandamus is affirmed.

Thereupon judgment on appeal was entered in said cause in the words and figures following, to wit:

73 In the Supreme Court of Montana Territory. January Term, A. D. 1886.

TERRITORY OF MONTANA *ex rel.* BOARD COMMISSIONERS OF CUSTER Co., Respondent,
vs.
BOARD OF COMMISSIONERS OF YELLOWSTONE COUNTY, Appellant.

Judgment on Appeal.

Be it remembered that in the present term of January, A. D. 1876, of said supreme court the above-entitled cause was brought into said court by virtue of an appeal agreeably to law by filing the transcript of the record therein of the court below, and said cause, coming regularly on to be heard before the court on the said transcript of record, was argued by counsel; thereupon, on consideration, it is now here ordered and adjudged by this court that the order and judgment of the court below entered in said cause on the 7th day of November, 1885, be, and the same is hereby, affirmed, with costs; and it is further ordered that said respondent recover against said appellant its costs herein, taxed at $—.

25th January, 1886.

74 And on the 13th day of March, A. D. 1886, the said appellant county filed herein its petition for an appeal from the said judgment of the supreme court of Montana Territory in said cause to the Supreme Court of the United States, of which said petition, in words & figures, the following is a copy, to wit:

In the Supreme Court of Montana Territory.

THE BOARD OF COUNTY COMMISSIONERS OF YELLOWSTONE COUNTY, MONTANA, Appellant,
vs.
THE TERRITORY OF MONTANA *ex rel.* BOARD OF COUNTY COMMISSIONERS OF CUSTER COUNTY, MONTANA, Respondent.

Petition for Appeal.

To the Honorable Decius S. Wade, chief justice of the supreme court of the Territory of Montana:

The plaintiff and appellant in the above-entitled cause, to wit, The Board of County Commissioners of Yellowstone County, in the Territory of Montana, by counsel, respectfully states that this is an action at law upon an application by the appellee for a writ
75 of mandate commanding the said appellant, The County of Yellowstone, to cause a warrant to be drawn on the county treasurer of said appellant against the general fund thereof for the sum of five thousand eight hundred and twelve & $\frac{20}{100}$ dollars, payable to The County Commissioners of the said County of Custer, appellee, in satisfaction and payment of certain expenses incurred

by the said county of Custer for and on behalf of the said appellant county, as set forth and mentioned specifically in the petition and complaint herein.

That at a term of the supreme court of the Territory of Montana, begun on the 4th day of January, A. D. 1886, a final judgment was rendered in the above cause affirming, the judgment of the court below, granting a peremptory writ of mandamus against said appellant county, directing the payment by it to the said county of Custer, appellee, by its warrant on its said treasurer for the said sum of $5,812.20, the amount claimed, and costs of suit, and ordering the court below to enter judgment accordingly; and your petitioner, for an appeal, says that the amount in controversy in this cause, wherein final judgment has been rendered against it, exceeds the sum of five thousand dollars, exclusive of costs. Petitioner
76 further states that manifest error hath happened and injustice been done in said final judgment of the supreme court for the Territory of Montana, to the great damage of your petitioner.

Wherefore your petitioner prays an appeal from the said supreme court of the Territory of Montana to the Supreme Court of the United States, as provided by law, and that a citation issue accordingly. Your petitioner now here presents to your honor a good and sufficient bond, in the sum of five hundred dollars, in accordance with rule twenty-nine of the rules of the Supreme Court of the United States in such case made and provided, conditioned as therein required, and asks that said bond be approved to operate as a supersedeas.

SANDERS, CULLEN AND SANDERS &
E. W. & J. K. TOOLE &
WM. WALLACE, JR.,
Solicitors & Counsel for Appellant.

TERRITORY OF MONTANA,
County of Lewis & Clarke, } ss:

I, William Wallace, Jr., being duly sworn, on oath says that I have examined the record in the above-entitled cause and know the contents thereof, and that the matters and things stated in the
77 foregoing petition for an appeal are true in substance and in fact.

WM. WALLACE, JR.

Subscribed & sworn to before me this 13th day of March, A. D. 1886.

I. R. ALDEN, *Clerk.*

I allow this appeal.
March 13, 1886.

DECIUS S. WADE,
Chief Justice.

And on the 22nd day of March, A. D. 1886, said appellant county filed herein its bond on said appeal in the words & figures following, to wit:

Bond on Appeal.

Know all men by these presents that we, Herman Mund and Frank B. Kennard, of Yellowstone county, Montana Territory, are held and firmly bound unto the Territory of Montana, for the use and benefit of Custer county, in said Territory, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Territory of Montana for the use aforesaid or to its legal representative; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

78

Sealed with our seals and dated the 15th day of March, one thousand eight hundred and eighty-six.

Whereas lately, at a term of the supreme court for the Territory of Montana, in a suit pending in said court between The Territory of Montana *ex rel.* The Board of County Commissioners of said Custer County, plaintiff, and The Board of County Commissioners of Yellowstone County, Montana, defendant, there was rendered a final judgment and decree in favor of the plaintiff and against the said defendant for more than five thousand dollars, exclusive of costs; and the said defendant having obtained an order allowing an appeal upon a petition filed therefor and filed a copy thereof in the clerk's office of the said supreme court for the Territory of Montana to reverse the judgment in the aforesaid court and suit, and a citation directed to the said plaintiff citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of October next:

79

Now, the condition of the above obligation is such that if the said defendant shall prosecute its said appeal to effect and answer all damages and costs, if it shall fail to make good its plea, and shall pay such sum as may be recovered for the use and benefit of said plaintiff and the costs of the suit and interest on the appeal, then the above obligation to be void; else to remain in full force and virtue.

HERMAN H. MUND. [SEAL.]
FRANK B. KENNARD. [SEAL.]

Sealed & delivered in the presence of—
O. F. GODDARD.

TERRITORY OF MONTANA, } ss:
County of Yellowstone, }

Herman H. Mund and Frank B. Kennard, being first duly sworn, on oath say, each for himself and not one for the other, that he is worth the sum specified in the foregoing bond as the penalty thereof,

over and above his just debts and liabilities, exclusive of property exempt by law from execution.

HERMAN H. MUND.
FRANK B. KENNARD.

Subscribed & sworn to before me this 15th day of March, A. D. 1886.

[NOTARIAL SEAL.] O. F. GODDARD,
Notary Public.

80 *Citation.*

United States of America to the board of county commissioners of Custer county, Montana Territory, and Messrs. Strevelle and Garlock, its attorneys of record, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of October next, pursuant to a petition and an allowance of an appeal filed in the clerk's office of the supreme court for the Territory of Montana, wherein the county of Yellowstone, by its board of commissioners, is appellant, to show cause, if any there be, why a certain final judgment in favor of the Territory of Montana *ex rel.* the board of county commissioners of Custer county, Montana, and rendered against the said appellant, as in the said petition for an appeal mentioned, should not be corrected and reversed and speedy justice done to the parties in that behalf.

Witness Honorable Decius S. Wade, chief justice of the supreme court of Montana Territory, this 12th day of March, A. D. 1886.

DECIUS S. WADE,
Chief Justice.

81 TERRITORY OF MONTANA, } ss:
Yellowstone County, }

O. F. Goddard, being first duly sworn according to law, deposes and says he received the within citation for service on the 16th day of March, 1886, and that he personally served the same, on the 17th day of March, 1886, on Luther C. Dear, county clerk & recorder of the county of Custer, in the Territory of Montana, and Messrs. Strevelle & Garlock, attorneys of record of the within-named board of county commissioners of said Custer county, they being the parties cited, by delivering to each of said parties personally, at Miles City, Custer county, Montana Territory, a certified copy of the within and by exhibiting then and there to each of said parties the within original citation and the official signature of Decius S. Wade, chief justice, thereunto appended.

O. F. GODDARD.

Subscribed and sworn to before me this 19th day of March, A. D. 1886.

THEO. MUFFLY,
Clerk First Judicial District Court
in & for Yellowstone County, Montana,
By JOHN TINKLER,
[SEAL.] *Deputy Clerk.*

82 In the Supreme Court of Montana Territory.

BOARD OF COMMISSIONERS OF YELLOWSTONE COUNTY, Appellant,
vs.
BOARD OF COMMISSIONERS OF CUSTER COUNTY, Respondent.

I, Isaac R. Alden, clerk of the supreme court of Montana Territory, do hereby certify that the foregoing eighty-one pages, numbered from 1 to 81, inclusive, contain a full & complete transcript of certain pleadings, records, and proceedings filed, made, and had in said court in the above-entitled cause as the same appear on file and of record in my office.

Witness my hand and the seal of said supreme court hereunto affixed the 20th day of May, 1886.

Seal Supreme Court, Montana Territory.

ISAAC R. ALDEN, *Clerk.*

Endorsed on cover: Montana Territory supreme court. No. 309. The Board of County Commissioners of Yellowstone County, Montana Territory, appellant, *vs.* The Board of County Commissioners of Custer County, Montana Territory. Filed March 28, 1887.

Supreme Court of the United States.

October Term, 1889.

THE BOARD OF COUNTY COMMISSIONERS, YELLOWSTONE COUNTY,
APPELLANT,
v.
THE BOARD OF COUNTY COMMISSIONERS, CUSTER COUNTY,
RESPONDENT.

No. 309.

APPELLANT'S BRIEF.

W. F. SANDERS,
Counsel for Appellant.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1890.

Supreme Court of the United States.

OCTOBER TERM, 1889.

THE BOARD OF COUNTY COMMISSIONERS, YELLOWSTONE COUNTY, APPELLANT,

v.

THE BOARD OF COUNTY COMMISSIONERS, CUSTER COUNTY, RESPONDENT.

No. 309.

APPELLANT'S BRIEF.

I.

This was an action for a writ of mandate against the defendants who were the Commissioners of the County of Yellowstone to compel them to issue a warrant for the sum of $5,812.20, upon the treasurer of their county, payable to the county of Custer, for and on account of the expenses, "costs, and charges" of Yellowstone county, for a term of court held in the county of Custer, under a provision of the law of the Territory of Montana, which reads as follows:

"SEC. 1102. Whenever a term of the district court shall be held in any county in this territory and another

county is attached to such county for judicial purposes, at the close of each term it shall be the duty of the justice presiding at such term to make an inquiry as to what share of the 'public expense' of such term was incurred for and on account of the county or counties so attached, or litigants therefrom, and to 'apportion' the same, and to make an order directing the reimbursement to the county incurring such 'expense' by the county so attached; and it shall be the duty of the board of county commissioners of the attached county to draw their warrants on the treasurer of their county out of their general fund payable to the county commissioners of the county incurring said expense, and to forward the same to the treasurer of the county, who shall make report thereof to the board of county commissioners of his county so soon as the same shall be received, and the said warrants shall be paid in due course, as is provided by law, and the said district court is authorized to make any and all necessary orders for carrying this section into effect as equality and justice may require."

Compiled Statutes, Montana, page 953.

I.

Does the statute providing for an apportionment of the "expenses" of a term of court apply in the case of Yellowstone county and Custer county as to the April term, 1883?

The history of the attachment of one county to another for judicial purposes is, that in many sparsely settled counties in the frontier Territories and States facilities for holding court were poor and juries difficult to obtain. Such counties were deemed not of sufficient consequence to justify the holding therein of a term of court, although they possessed political autonomy, and for the purposes of enforcing the laws therein judicially they were attached to adjacent and larger counties, in which their courts were held.

That they might not be absolved from the expenses of trying cases however, the law in question was passed. Such

attached counties had peace officers, and assumed to maintain order, and if it was necessary to prosecute persons for that purpose, it was deemed proper that they should be held responsible for their public order and pay the public expenses incurred by a violation thereof.

But the case at bar shows that Custer county was administering public justice over an area subsequently called Yellowstone county, but which was Custer county when the offences were committed, and its officers were chargeable with the maintenance of public order therein.

It is submitted that a county so situated was not within the intention of the legislature nor the purview of the act authorizing an apportionment of "expenses."

In the Session Laws of Montana of the 13th Regular Sesssion, in the law creating Yellowstone county, approved Feb. 26, 1883, on page 122, it is provided:

"SEC. 11. This act shall take effect from and after its passage, but the county of Yellowstone shall remain united to the county of Custer for judicial purposes until the first day of May, A. D. 1883, and the officers of Custer county shall act as officers of Yellowstone county until the date above named except as otherwise provided in this act."

The case was treated in the court below as if the affidavit were a complaint, and the return an answer.

II.

Did the judge as to the expenses of the term of court begun at Miles City, Custer county, on the 10th day of April, 1883, do and perform the particular thing authorized by him to be done under the provisions of the law above cited? And, as to this, by the statute, at the close of the term it was the duty of the judge to inquire

what *share* of the public *expense* of said term was incurred for and on account of Yellowstone county. And, secondly, he was to *apportion* the *expenses*. He had no other authority than this, which was a special proceeding, without pleadings between the parties interested, and he was required to follow an exact line of duty, which was to ascertain the *share* of *expenses* incurred on account of Yellowstone county, and to *apportion* the same. Instead of this the court made inquiry as to "what half of the public expense" of that term was incurred on account of Yellowstone county.

No statute had said anything about any half of the public expenses, and the court did not proceed to inquire what sum was incurred on account of Yellowstone county, nor did it ascertain the amount of the total public expense incurred in holding said term of court, and then proceed to inquire how much of the term had been occupied in trying cases arising from the county of Yellowstone, nor had any statute said anything as to "costs and charges."

The court simply said, uncertain "costs, charges, and public expenses" in certain cases should be paid by the county Commissioners of Yellowstone county.

It did not proceed to ascertain the amount of these costs, charges, and public expenses, but left that to the clerk of the court or his deputy. As to those charges, and public expenses, there being nothing in the statute on the subject, and the plaintiff county having obtained an order which did not meet the requirements of the statute, but suited its purposes, its officers proceeded to make out extravagant, extortionate, and unlawful bills of cost averaging $580 in each case, and these costs this mandamus was brought to collect.

The writ of mandate is not a substitute for an action for moneys paid, laid out, and expended, and is only proper where a specific duty is prescribed by law, nor then if another remedy exists.

If the court had ascertained the precise amount due in proceedings to which Yellowstone county was a party, or at the time and place when Yellowstone county was constructively present, namely, April 27, 1883, so as that the county of Yellowstone would have had a hearing, and an adjudication from which it might appeal, or by which it might abide, and it had contented itself with that adjudication, then a precise duty would have devolved upon the commissioners of Yellowstone county, but mandamus would not have been the proper remedy, for on refusal to allow the account an appeal would lie.

But the court did not assume to ascertain the total expenses of the term, and apportion the precise share of Yellowstone county; nor did it assume to ascertain the amount of "costs, charges, and expenses" in the ten cases mentioned by it, but referred that matter to the clerk of the court, directing him to furnish the same "as soon as practicable," and thereafter a deputy clerk made out a bill upon its face illegal and extortionate, the integrity of which rests not upon a recognition by the court that the items are correct; nor upon any statement that they are the expenses which the court had in its mind when it made the order of April 27, 1883; nor is there any statement or finding that these costs or any of them had been on the 27th day of April, 1883, entered into the book as part of any judgment, but it is said, that the County Commissioners may be compelled, as a matter of official duty about which there is no discretion, and from which there is no lawful escape, to issue a warrant paying these sums.

There is no pretence that the clerk was appointed a referee, that he served any notice on anybody to appear before him, that in any shape or form there was a proceeding in his presence inquiring what were the lawful expenses, of which the parties were notified, or of which Yellowstone

county had notice; nor is there any pretence that any subsequent proceeding was had by the judge, or that any court confirmed this action of the clerk.

The court did not ascertain the total expenses of the term, and apportion an aliquot part thereof to the county of Yellowstone, as the law provides.

That this is the meaning of the foregoing section seems plain, and it secures to the attached county some assurance that the expenses of the court will be reasonable, and that they will not be fraudulently and extortionately augmented.

III.

In the case at bar, upon the face of the accounts, so far as they are explained at all, they are fraudulently unlawful. According to the deputy clerk's statement of affidavits of attendance and mileage of witnesses, fifty-six out of fifty-nine witnesses made affidavits of travelling such number of miles as was the multiple of ten. Twenty-nine witnesses out of fifty-nine travelled precisely three hundred miles; eight witnesses, precisely six hundred miles; although no settlement can be found precisely that distance or one-half that distance away.

Upon its face the account bears evidence of an attempt to extort unlawful moneys from Yellowstone county. And while the county of Yellowstone was willing to pay any just expenses of the term, it resists payment of this sum to be enforced by mandamus. Among the items resting solely for their integrity upon the figuring of a deputy clerk or the affidavit of a witness, two hundred and seventy-three dollars is wholly unexplained. Of the sheriff's fees, $151 are alleged in the return to be extortionate and illegal, and the return also affirms that the amounts charged for mileage of witnesses are largely in excess of the miles actually

travelled; and although the order of the court had not fixed the amount to be paid definitely, this action is brought to enforce the payment of the entire amount, and the court refused to inquire what were the actual legal expenses, holding that extortionate and illegal fees might be collected of Yellowstone county, and that it was the duty of the commissioners of that county to issue their warrant for such extortionate and illegal fees. Presumably it held if Custer county did not inquire as to the illegality of items presented, but paid the same, Yellowstone county, not Custer, should suffer, and that Custer county should take advantage of its own wrong.

IV.

But mandamus was not the proper remedy, there existing no precise duty prescribed and the amount of expenses not having been fixed in the order. In any proceeding where Yellowstone county was a party or could be heard, the most a writ of mandate could have required was that Yellowstone county pay a per cent. of the expenses of that term; or if the order could take the form which it did in this case, then it could have required that the Commissioners of Yellowstone county issue their warrant to pay the lawful expenses of the ten cases named, leaving the ascertainment of the amount thereof to some proper tribunal in the ordinary course of the law. Such a proceeding would have permitted Yellowstone county to inquire into the somewhat remarkable account presented.

But there is another reason why a writ of mandate is not the proper remedy.

Section 567 of the Compiled Statutes of Montana, page 207, confines the issuance of a writ of mandate to those cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law, and there was a plain legal remedy in this case.

On pages 846, 847 of the Compiled Statutes of Montana are the following provisions touching the presentation of claims againt countries:

"SEC. 764. Whenever a claim of any person against a county shall be disallowed, in whole or in part, or when any tax-payer of the county shall feel aggrieved by any allowance made by the board as excessive, unjust to the county, or illegal, such person may appeal from the decision of such board to the district court, for the county, by causing a written notice of such appeal to be served on the clerk of such board, within thirty days after the making of such decision or allowance, and executing a bond to such county, with surety to be approved by the clerk of such board, conditioned to prosecute such appeal to effect, and to pay all costs that shall be adjudged against the appellant.

"SEC. 765. The clerk of the board, upon such an appeal being taken, shall immediately give notice thereof to the county attorney, and shall make out a brief return of the proceedings in the case before the board, with their decision thereon, and shall file the same, together with the bond and all the papers in the case, in his possession, with the clerk of the district court; and such appeal shall be entered, tried, and determined, the same as appeals from justices' courts, and costs shall be awarded in like manner."

It was therefore competent for the commissioners of Custer county to present their claims against Yellowstone county to the commissioners, and when disallowed, in whole or in part, to have appealed to the district court.

That such law is fatal to a proceeding in mandamus seems to be settled by a number of decisions. Among others, The People *v.* The Supervisors of Macomb County, 3d Michigan, 475.

That a writ of mandate can not be substituted for an appeal, or writ of error, has been decided by this Court in many cases—see 105th United States Supreme Court Reports, pages 578, 580. Also *ex parte* Baltimore and Ohio

Railroad Company, 108th United States Reports, 566, 567. Also, Wright's Ohio Reports, page 353; and also, in the matter of the White River Bank, 23d Vermont Reports, page 478.

From all these cases, and many more which might be cited, it appears that where a party has an appeal or a writ of error, or any other effective and lawful means, a writ of mandamus will not lie.

It is therefore apparent that the proceeding is one which is not justified by law, and that the respondents in this case have mistaken their remedy.

W. F. SANDERS,
Counsel for Appellant.

IN THE

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1889.

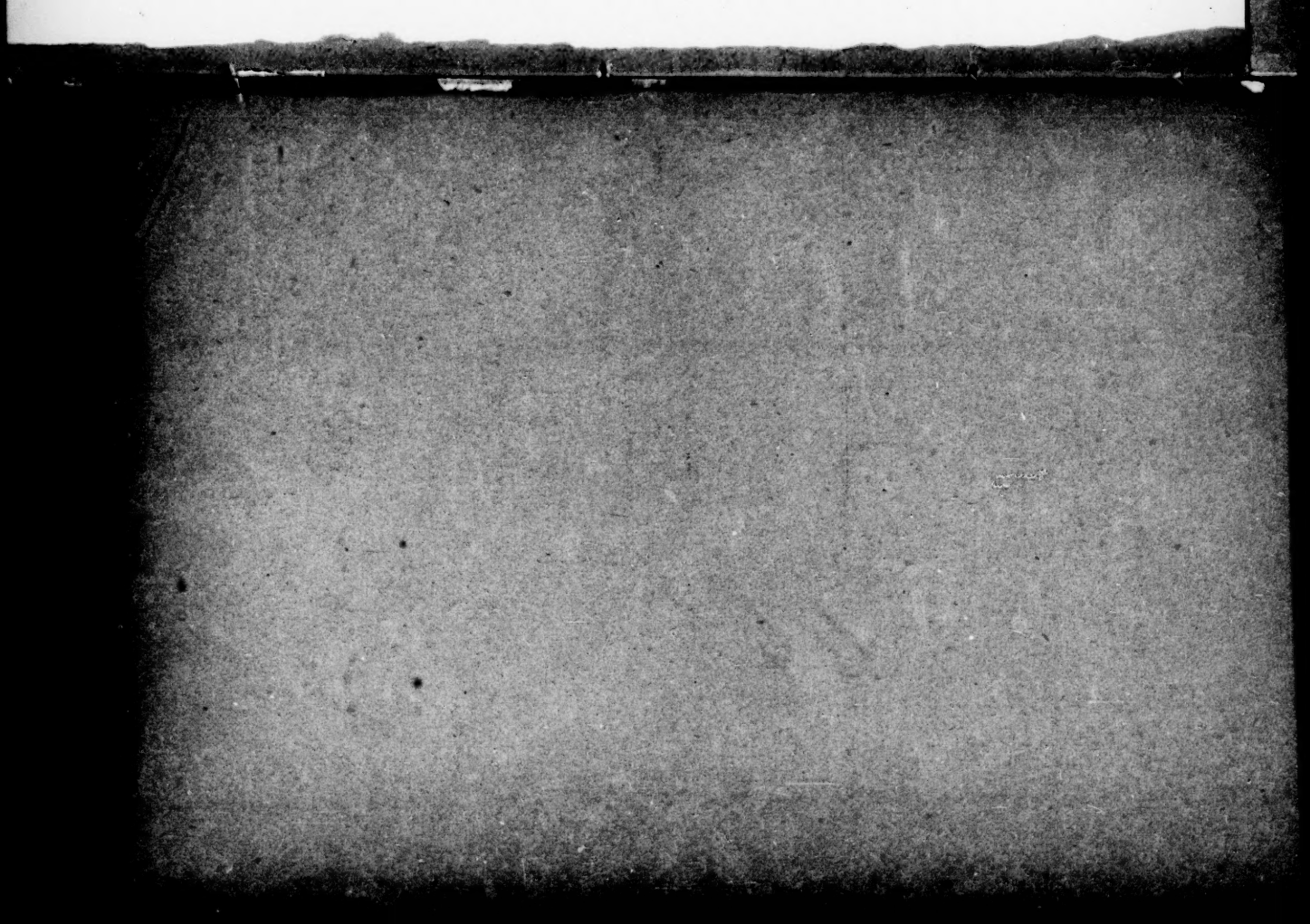
BOARD OF COMMISSIONERS OF YELLOWSTONE COUNTY, MONTANA TERRITORY,
Appellants,

vs.

BOARD OF COMMISSIONERS OF CUSTER COUNTY, MONTANA TERRITORY,
Respondents.

BRIEF AND ARGUMENT OF RESPONDENTS.

JASON W. STREVELL,
Attorney for Respondents.



IN THE SUPREME COURT
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THE BOARD OF COMMISSIONERS OF YELLOWSTONE COUNTY, MONTANA TERRITORY,
Appellants,

vs.

THE BOARD OF COMMISSIONERS OF CUSTER COUNTY, MONTANA TERRITORY,
Respondents.

RESPONDENTS' BRIEF.

May it please the Court:

The action below was a writ of mandate to compel the commissioners of the appellant county to perform a duty enjoined by law, in the matter of drawing their warrants to pay a portion of the expenses incurred in holding the April term, 1883, of the district court in the county of Custer, to which appellant county was at the time by law attached for judicial purposes.

The record, and the provisions of the territorial law quoted below, will, it is believed, be sufficient for an intelligent understanding of respondents' view of the case.

The appellant county was constituted by an act of the legislative assembly of the then Territory of Montana, approved Feb. 26, 1883.

Sec. 1 of that act provides:

"That all that portion of Montana territory lying and situate "within the following boundaries, to-wit: * * * be and the "same is hereby erected into a new county which shall be known "and called Yellowstone county. All laws of a general nature, "applicable to the several counties of this territory and the offi- "cers thereof, are hereby made applicable to the county of Yel- "lowstone and the officers who may hereafter be elected or ap- "pointed therein, except as otherwise provided in this act."

The boundaries of the new county, as defined in this section, with the exception of a small fraction of territory segregated from Gallatin county, constituted the appellant county out of territory which had theretofore been a part of Custer county.

Sec. 2 of the same act provides:

"That the indebtedness of the county of Custer, as the same "shall exist on the first day of March, 1883, shall be apportioned "between the said county and the county of Yellowstone, by "first deducting from said indebtedness all money on hand in "the treasury of said county of Custer, and all moneys be- "longing to said county in the possession and under the control "of the county treasurer; also deducting the cost of erecting "and furnishing court house, county jail, poor house, and also "the valuation of all real estate owned by said county as shown "by the books of the county commissioners. The remainder of "the indebtedness shall be divided between said counties in pro- "portion as the taxable property in each county bears to the en- "tire taxable property of the present county of Custer, taking "as a standard thereof the assessment of 1882."

Sec. 3 of the act provides for the meeting on the first Mon- day of March, 1883, of the commissioners of the two counties, at Miles City, in Custer county, to apportion the debt on the basis provided in Sec. 1.

Sec. 4 of the act provides:

"An election shall be held in the county of Yellowstone on "the second Monday of April, in the year 1883, in the different "precincts and voting places appointed at the last general elec- "tion, for the election of the following officers, to-wit: One "sheriff, one probate judge, one county clerk, one assessor, one "county treasurer, one county surveyor, one coroner, one "county superintendent of schools, and three county commis- "sioners."

Sec. 5 of the act provides:

"That John H. Gerrish, Fred. A. Foster and Paul McCor- "mick are hereby appointed commissioners of Yellowstone "county with like powers and duties as by law are conferred "upon county commissioners in other counties in this territory. " * * * They shall continue in office until their successors "are elected and qualified, as provided in Sec. 4 of this act."

Sec. 6 to 10, both inclusive of the act, are devoted mainly to directions for the management of the affairs of the new county, and are of no purpose to quote here.

Sec. 11 of the act provides:

"This act shall take effect from and after its passage, but the "county of Yellowstone shall remain united to the county of "Custer for judicial purposes until the first day of May, 1883, "and the officers of the county of Custer shall act as officers of "Yellowstone county until the date above mentioned, except as "otherwise provided in this act."

Sec. 12 of the same act provides:

"The county boundaries of the counties of Gallatin and Cus- "ter are hereby altered to conform to the county boundaries of "Yellowstone county, as established in this act."

"*Approved Feb.* 26, 1883."

The act in full, creating the appellant county, is at page 119, laws of Montana, session of 1883.

It will be observed that Sec. 1, of the act quoted makes "all "law of a general nature applicable to the several counties of the "territory and the officers thereof * * * applicable to the "county of Yellowstone and the officers who may be hereafter "elected or appointed therein," and that Sec. 11 of the act attaches the new county of Yellowstone to the county of Custer, for judicial purposes, till the first day of May, 1883.

Among the general laws of the territory applicable to all the counties at that time, were the following:

Sec. 60. "When a county shall be attached to another county "for judicial purposes, actions arising or triable therein, of which "the district court shall have exclusive jurisdiction, shall be "commenced and tried in the county to which such county may "be so attached."

Revised Statutes Montana, 1879, *p.* 72, *sec.* 60.

Sec. 603. "Whenever a term of the district court shall be "held in any county in this territory, and another county is at-"tached to such county for judicial purposes, at the close of "each term it shall be the duty of the justice presiding at such "term, to make an inquiry as to what share of the public ex-"pense of such term was incurred for and on account of the "county, or counties, so attached, or litigants therefrom, and to "apportion the same, and to make an order directing the reim-"bursement of the county incurring such expense by the county "so attached; and it shall be the duty of the board of county "commissioners of the attached county to draw their warrants "on the treasurer of said county, out of their general fund, pay-"able to the county commissioners of the county incurring said "expense, and to forward the same to the treasurer of the county, "who shall make a report thereof to the board of county com-"missioners of his county, as soon as the same shall be received; "and the said warrant shall be paid in due course as provided "by law; and the said district court is authorized to make any

"and all necessary orders for carrying this section into effect, as "equity and justice may require."

Revised Statutes Montana, 1879, *p.* 157, *sec.* 603.

This law has at all times during this controversy, and long anterior to that time, been in force in this territory.

While the appellant county was so attached to Custer county for judicial purposes, a term of the district court was held at Miles City, the county seat of Custer county, for the two counties, commencing on the tenth of April, 1883, and ending on the twenty-seventh of the same month. At this term of court ten different indictments were found, by the grand jury, against as many different persons for offenses committed within the county of Yellowstone. These cases were all tried, or otherwise disposed of, at that term. In the matter of their prosecution, costs and expenses were incurred, which were paid by the county of Custer. At the close of the term, the presiding judge made inquiry, as by law required, as to what share of the expenses of the term had been incurred on behalf of the attached county, and what amount should be charged and apportioned to it of such expenses. This inquiry resulted in the judgment and order which will be found at page 4 of the record.

The computation of the expenses in the cases stated in the order was directed to be made by the clerk of the court, and the amount was ascertained to be $5,812.21. The clerk, as directed by the order thus made, rendered the account to the proper authorities of both counties, as the statutes provided should be done.

The board of commissioners of the appellant county wholly disregarded the order made by the presiding judge, in relation to payment, and after the lapse of a year the commissioners of Custer county made application for a writ of mandate by the petition and affidavit at page 1 of the record.

The statutes of the territory then, as now, provided in relation to the writ of mandate:

*

"The writ may be issued by any court in this territory, ex-
"cept a justice's, probate or mayor's court, to an inferior tri-
"bunal, corporation, board or person, to compel the perform-
"ance of an act which the law specifically enjoins as a duty result-
"ing from an office, trust or station."

Revised Statutes Montana, 1879, *p.* 142, *sec.* 548.

"The writ shall be issued in all cases where there is not a
"plain, speedy and adequate remedy in the ordinary course of
"law. It shall be issued upon affidavit, on application of the
"party beneficially interested."

Revised Statutes Montana, 1879, *p.* 142, *sec.* 548, 549.

The application and affidavit was, in the first instance, filed in the district court, in and for the county of Custer; but on the seventeenth of April, 1884, the defendant county appeared, demurred, and moved the court to change the venue of the cause to the county of Gallatin, which application to change was granted, and the subsequent proceedings, so far as the district court was concerned, were had in the county of Gallatin.

Record, *p.* 10.

The demurrer filed April 17, 1884, was afterward, and on the twenty-third day of April, 1885, argued and overruled, and the alternative writ awarded.

Record, *p.* 14.

In answer to the command of the alternative writ to obey or show cause, the answer of the appellant was filed page 15 of the record. To this answer the plaintiff, as at page 10 of the record, demurred.

The statutes of Montana then, as now, provided:

"The plaintiff may demur to the answer of the defendant, or
"to one or more of the several defenses or counter claims set up
"in the answer upon one or more of the following grounds: *
" * * *Second:* That the answer does not state facts suffi-
"cient to constitute a defense or counter claim."

Revised Statutes Montana, 1879, *p.* 57, *sec.* 91.

This demurrer to the answer was sustained by the district court, and a brief opinion in writing rendered as at page 19 of the record. The appellant county chose to abide its answer, and on the seventh of November, 1885, the peremptory writ was awarded, as at page 22 of the record, from which judgment, ordering the peremptory writ, the defendant county appealed to the supreme court of the territory, where, at the January term, 1886, the judgment of the court below was affirmed.

Opinion at p. 27 of the record.

From the latter judgment the county of Yellowstone appeals to this court.

It will be our purpose to urge, as briefly as consistent, our reasons for assuming the correctness of the decision in the court below.

I.

There is no act of Congress, so far as we know, imposing any restrictions upon the legislative authority of the Territory of Montana to constitute new counties, or to regulate the payment of expenses for the administration of justice within them. These are rightful subjects of legislation.

Laramie County v. *Albany County*, 92 *U. S.* 307.

The territorial law which we have before quoted, providing that where one county is, for judicial purposes, attached to another, the judge presiding shall, at the close of the term, make inquiry and apportion the expenses between them, is mandatory. It is the sole means provided by law for administering justice between the counties, in this regard, and to omit it would be not only to work injustice to one of the counties, but a gross violation of law as well. The time and place for this judicial inquiry and apportionment to be made are fixed by law. The parties interested, or to be affected, are bound to take notice of the proceeding. If the presumption that officers do their duty

is to be indulged here as elsewhere, then we are at liberty to assume that the proper officers of both counties who were then administering public affairs within them, were present and acquiesced in the judgment then rendered. But whether they were, or not present, the court would and did perform the duty which the law imposed, and, having done so, his judgment is not open to collateral attack. But before presenting our views upon the question that this is a final judgment and not open to collateral attack, we desire to present another phase of this question: that is, that this answer would be of no consequence even in a direct proceeding to correct the judgment. The answer of the appellant county to the alternative writ, at page 15, of the record, admits all the material matters alleged in the application for the writ, but seeks to avoid by alleging that the crimes, for the prosecution of which the expenses were incurred, were committed within the boundaries of what was at no time the county of Custer. Suppose that to be true, there would still be no merit in the allegation, either in fact or law. The act creating the appellant county fixed the date at which the debt of Custer county should be apportioned between the two, as of the first day of March, 1883, two days after the law went into effect.

"The indebtedness of Custer county, as the same shall exist "on the first day of March, A. D. 1883, shall be apportioned," is the language of the act.

After that date the two counties were as independent of each other in their debts, costs and expenses, as they could ever be.

Yellowstone county was for a time subsequent to that attached to Custer county for judicial purposes, but provision was made by the act, that under another and general law of the territory already quoted, subsequent costs and expenses in that behalf should be apportioned between them. That duty was imposed upon the judge presiding at the term of court where actions from both counties were cognizable. If the act creating the appellant county had fixed the date for apportioning the

debt of Custer county at the close of the April term, 1883, instead of the first day of March, as it did, the county of Yellowstone would still have had its added portion of the debt to pay, as now.

The other allegations of the answer are equally without merit in any proceeding, direct or otherwise. The allegation "that the amounts allowed to sundry witnesses in said accounts "are largely in excess of the number of miles actually trav-"eled," would not be entitled to any consideration even in a direct proceeding to retax costs. Who are the "sundry witnesses" to whom excessive mileage was allowed? And the further allegation "that the same is extortionate and illegal," is equally vague. Who has extorted? What particular witness?

In *Hubbard* v. *Tomlinson*, 2 *Montana*, 120, the court said:

"There is nothing in a motion to retax costs that requires it "to be entertained without some showing to support it. A mo-"tion to retax costs should always be supported either by the "records or by affidavits showing the illegal charges."

That was in part a direct proceeding to retax costs, and was denied for want of any sufficiently definite allegation upon which to base any action. Here, in an answer entirely collateral, there is not the faintest allusion to any particular witness who has taken excessive mileage or illegal fees, or extorted in any way.

II.

Independent of any question of want of sufficient allegation, we submit that this judgment cannot be collaterally attacked. The duty imposed upon the judge to apportion the expenses of the term, and adjudge between the counties in the matter of expenses, was as much a judicial proceeding as any proceeding could be, and unless the judgment is appealed from, or vacated, or modified in some proceeding had directly for that purpose, it is final and cannot be collaterally attacked.

Harvey v. *Tyler*, 2 *Wall.* 328.
Kemp v. *Kennedy*, 2 *Cranch*, 173.
Grignon's Lessees v. *Astor*, 2 *Howard*, 319.
Brewer v. *Boston, etc., R. R. Co.*, 113 *Mass.* 52.
Arthur v. *Adam*, 49 *Miss.* 104.
Pulaski v. *County Judge*, 37 *Ark.* 339.
Stone v. *Charlestown*, 114 *Mass.* 215.
Gould v. *Steinberg*, 128 *Ill.* 510.
Bourough of Dunmore's Appeals, 52 *Pa. St.* 374.
Freeman on Judgments, 3d *Ed. sec.* 249.
Chemile City v Tracy 132 U.S. 2 10

The statute of Montana at the time this order was made, as now, provided:

"Any party may appeal from a judgment in an action or "special proceeding commenced in the court in which the same "was rendered within one year after the entry of judgment."

Revised Statutes Montana, 1879, *p.* 119, *sec.* 408.

"And when, from any cause satisfactory to the court or the judge "at chambers, the party aggrieved has been unable to apply for "the relief sought during the term at which such judgment or "order or proceeding complained of was taken, the court or "judge at chambers in vacation, may grant the relief upon ap- "plication made within a reasonable time, not exceeding five "months after the adjournment of the term."

Revised Statutes Montana, 1879, *p.* 60, *sec.* 114.

This statute was in force long anterior to any proceeding in this case, and has ever since been in force; yet, more than two years after the entry of the judgment, and more than one year after the time for any statutory remedy had elapsed, the appellant county seeks to avoid, by collateral attack, a judgment of which it has never made the least complaint in any direct proceeding.

Mr. Freeman, in his work on Judgments, 3d Ed., Sec. 249, says:

"It is a universal principle that where power or jurisdiction "is delegated to any public officer or tribunal over a subject-"matter, and its exercise is confined to his or their discretion, "the acts so done are binding and valid as to the subject-mat-"ter."

III.

The position heretofore assumed in argument in this case, by counsel for appellant county, that the county of Custer had mistaken its remedy in applying for a writ of mandate, is scarcely worthy of comment here. The order made by the judge, apportioning the expenses of the term, was not, and, under the statute, could not be in the nature of an ordinary judgment, to be enforced by execution; but it was a judgment requiring "an inferior tribunal" to do certain things to carry its provisions into effect. If any ordinary judgment of law had been, or could have been, obtained, execution could not have issued under such judgment; hence, there was no remedy in the ordinary course of law, for the statute under which the order was made provides a special way in which such claims shall be paid, to-wit:

"It shall be the duty of the board of commissioners of the "attached county to draw their warrants on the treasurer of said "county out of their general fund, payable to the county com-"missioners of the said county incurring said expense, and to "forward the same to the treasurer of the county, * * * and "the said warrants shall be paid in due course, as provided by "law."

So that whatever judgment might have been obtained, or whatever the form of the proceeding might have been, the judgment would have been of no higher validity or authority than the one which was rendered in this case, and when it was disobeyed, as it was here, the only recourse was the writ of mandate.

High Ex. Rem. sec. 365 *and cases cited.*
Dill Mun. Corp., 3d Ed., sec. 824–837.
Hastings v. *San Francisco*, 18 *Cal.* 49.
Emerick v. *Gillman*, 10 *Cal.* 404.

Kilbourn v Sunderland 130 U.S. 505

Beside the sanction given to the issuing of the writ by general authority and precedent, in this case the act directing the presiding judge to make the apportionment of expense also provides that:

"The said district court is authorized to make any and all "necessary orders for carrying this section into effect as equity "and justice may require."

One of the appropriate methods of compelling obedience to the order, where obedience was refused, was by the writ of mandate.

It is respectfully submitted that the judgment of the court below should be affirmed.

JASON W. STREVELL,
Attorney for Respondents.